91-1854

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

WILLIAM "RUSTY" WALLACE III,

Petitioner,

and

JACK IVEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To resolve a conflict between the United States Courts of Appeals for the Fifth Circuit and the Ninth Circuit regarding whether an element of the crimes charged is a question of law, or a question of fact.

2. In a case of first impression, whether the definition of the term "Convention" in 16 U.S.C. § 1532(4) should be varied from its plain meaning, as applied to 16 U.S.C. § 1538(c)(1).

3. In a case of first impression, whether the terms of The Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1977, 27 U.S.T. 1017, T.I.A.S. No. 8249, 993 U.N.T.S. 243, can be violated by trade between a signatory and a nonsignatory to that treaty.

4. In a case of first impression, whether due process requires specific intent to violate 16 U.S.C. § 1538(c).

LIST OF PARTIES

William "Rusty" Wallace III (petitioner here and appellant below).

Jack Ivey (petitioner here and appellant below).

United States of America (respondent here and appellee below).

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No. _____

In The

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WILLIAM "RUSTY" WALLACE III,

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UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners, William "Rusty" Wallace III, and Jack Ivey, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on December 17, 1991.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *United States v. Ivey*, 949 F.2d 759 (5th Cir. 1991), and is reprinted in Appendix A. No opinion was rendered by the District Court for the Western District of Texas (Pecos Division).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered on December 17, 1991. An extension for time was granted to Petitioner William "Rusty" Wallace III on January 7, 1992, extending the time to file the Petition For Rehearing to January 30, 1992. The Petition For Rehearing was filed on January 27, 1992, and denied on February 14, 1992. This Petition For Writ of Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES

The Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3, 1977, 27 U.S.T. 1017, T.I.A.S. No. 8249, 993 U.N.T.S. 243, is reproduced in Appendix C. For convenience, this Treaty shall be referred to in this Petition as "the Convention."

16 U.S.C. § 1532(4) states as follows: "The term 'Convention' means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto."

16 U.S.C. § 1538(c)(1) states as follows: "It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in Article I thereof."

18 U.S.C. § 545 states as follows: " . . . Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law shall be fined not more than $10,000 or imprisoned not more than five years, or both. . . . "

STATEMENT OF THE CASE

The jurisdiction of the District Court was invoked pursuant to 18 U.S.C. § 2321.

Petitioners were charged and convicted of conspiracy, and receipt of bobcat pelts, knowing the pelts were brought into the United States contrary to 16 U.S.C. § 1538(c)(1), i.e., the bobcat pelts were traded contrary to the provisions of the Convention.

As originally signed in 1973, the Convention did not cover bobcats. The bobcat, and most of the rest of the cat family, was added in 1978. The Republic of Mexico is not now, nor has it ever been, a signatory to the Convention.

The bobcat is not classified as an endangered or threatened species by the Secretary of the Interior pursuant to the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* In Texas, it is considered a predator, which may be trapped without a license, and pursuant to federal statute, hunted by aircraft.

Petitioners received the bobcat pelts in Texas. All bobcat pelts carried appropriate Texas bobcat tags, which required the trapper to swear that the bobcat was captured in Texas. None of the witnesses testified with personal knowledge that any of the pelts were from Mexico, and it is impossible to determine by sight, or any other method, whether a bobcat was from Mexico or the United States.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AS TO WHETHER AN ELEMENT OF THE CRIMES CHARGED IS A QUESTION OF LAW OR A QUESTION OF FACT.

The Fifth Circuit states its position as follows:

> Appellants believe the Government failed in proving the animals involved were of a specific subspecies, and that the subspecies is restricted by law. At trial, the judge instructed the jury that the hides were a species restricted by law, instead of the letting the jury make that determination.

> The argument is without merit. Appendix II of the Convention lists *Felides supp.* which includes all species of cat exclusive of the common house cat. The question of whether a "bobcat" is a species listed in Appendix II is a question of law for the trial judge and was properly withheld from the jury's consideration. Appendix A, p. 15.

The Fifth Circuit has allowed the trial court to take not one but two questions away from the jury: whether the "bobcat" was a subspecies listed in Appendix II, and whether the animals involved were of that subspecies.

This holding is in conflict with both the same matter of law and the general principles set forth in *United States v. Doyle*, 786 F.2d 1140 (9th Cir. 1986). In that case, the Ninth Circuit ruled that the Government had the obligation to prove, beyond a reasonable doubt, that the species involved in the prosecution was the specific subspecies restrained. 786 F.2d at 1140.

This conflict is important because it affects the elements and burden of proof for all criminal prosecutions under the Endangered Species Act. Currently, only this case and *United States v. Doyle*, address this issue. In order to maintain uniform enforcement of the Endangered Species Act, this Court must resolve this conflict.

The conflict also calls into the question the incursion of the judge into the province of the jury. The jury may not be relegated to deciding only questions that the judge determines to be factual. *United States v. Johnson*, 718 F.2d 1317 (5th Cir. 1983). Here, the District Court and the Court of Appeals have changed roles, from judges of law to judges of fact. The District Court determined that the

pelts involved were a specific subspecies, and that subspecies was restricted by law. The Court of Appeals upheld the District Court's ruling, and commented that the evidence was sufficient to support the District Court's findings of fact. These questions are within the jury's province, and such trespass should not be permitted.

2. THE DECISION BELOW RAISES SIGNIFICANT PROBLEMS WITH INTERPRETATION AND CONSTRUCTION OF A FEDERAL STATUTE, WHICH HAS NOT BEEN, BUT SHOULD BE RULED UPON BY THIS COURT, AS TO WHETHER THE STATUTORY DEFINITION OF A TERM SHOULD BE VARIED FROM ITS PLAIN AND EXPLICIT WORDING.

The wording of 16 U.S.C. § 1538(c)(1) is clear and specific; it applies only to "The Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973", as defined in 16 U.S.C. § 1532(4).

The Fifth Circuit gives three reasons for its variation of this statutory definition. First, it would be contrary to the purpose of the Endangered Species Act to view the Convention as a static document. Second, the Convention provides for amendments, so the statute's definition must include such amendments. Finally, the Ninth Circuit's rationale in *United States v. Francisco*, 536 F.2d 1293 (9th Cir.), *cert. denied*, 429 U.S. 942 (1976), regarding federal statutes which adopt state laws, is applicable to this situation. Appendix A, pp. 6-7.

This is an important question of federal law because it affects statutory interpretation in all federal cases, and provides guidance to those who attempt to rely on statutory definitions. The Fifth Circuit substituted its interpretation of a term for that of the Congress, who defined the term by statute.

This is also an important federal question with regard to notice. The fundamental principles of due process mandate that no individual be forced to speculate, in peril of indictment, whether his conduct is prohibited. Thus, to insure that the legislature speaks with special clarity when marking the boundaries of criminal conduct, the courts must decline to impose punishment for actions that are not "plainly and unmistakably" prescribed. *Dunn v. United States*, 442 U.S. 100, 112 (1979).

The plain wording of the law spells out what conduct is, and is not prohibited. No court in this nation has previously ruled on the statute or the definitions in question. To sustain its holding, the Fifth Circuit relied on the legislative history of the Endangered Species Act to determine its "true" purpose, and varied the clear wording of the definition as set down by Congress. The offense constitutes a violation of the terms of an appendix to an international agreement not applicable to one of the countries in question. The text is all but unlocatable even by an attorney, regarding an animal which is neither endangered nor threatened, but sanctioned by the federal government to be hunted by aircraft. How then can it be said the Petitioners had fair notice that their actions would be felonious?

3. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT, REGARDING WHETHER THE TERMS OF AN INTERNATIONAL TRADE AGREEMENT CAN BE VIOLATED BY TRADE BETWEEN A SIGNATORY AND NONSIGNATORY TO THAT TREATY.

Petitioners were convicted of possession of bobcat hides traded contrary to the provisions of the Convention.

The Fifth Circuit's position is that the failure to obtain the export permits is the violation of the terms of the Convention, which in turn is the violation of 18 U.S.C. 1538(c)(1). Appendix A, pp. 8-9.

The bobcat is listed under Appendix II of the Convention, which activates the provisions of Article IV, restricting export without a permit. The Convention is breached if the species crosses the border of a party, outbound, without a proper permit. It does not matter whether the species is going to another party, a nonsignatory, or taken to international waters and dumped overboard. The provisions of the Convention are violated the moment the species leaves the parties' boundaries without a permit. Acts contrary to the Convention, regarding Appendix II species, must be acts of export.

The Republic of Mexico is not a signatory to the Convention. As such, export from Mexico **cannot** be contrary to the Convention, as was confirmed by the representative from the Republic of Mexico at trial.

This is an important question of federal law and one uniquely suited for this Court to decide, because it deals

with international treaties, and the application of those treaties to the laws of the United States. Treaties now touch on most aspects of commerce. However, many of these treaties have nonparticipants in the global arena. This Court should provide guidance to those engaged in dealings with these nonparticipants as to how their status affects United States regulations. Failure to do so denies notice of the risk of criminal and civil sanctions for otherwise innocent trade based on the trading partners' participation in a treaty with the United States.

4. THE DECISION BELOW RAISES AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE DECIDED BY THIS COURT, REGARDING THE INTENT REQUIREMENT OF A CRIMINAL STATUTE INVOLVING VIOLATION OF THE TERMS OF AN INTERNATIONAL TREATY.

No court has addressed the issue whether 16 U.S.C. § 1538(c) is a specific or general intent statute. Because it renders the violation of certain administrative permit requirements a felony offense, specific intent should be required.

The Fifth Circuit ruled that it was a general intent statute, and gave three reasons. First, the wording of 16 U.S.C. § 1538(c), and the legislative history, indicated that Congress did not intend for it to be a specific intent crime. Second, adopting such position would thwart the purpose of the Endangered Species Act. Finally, adopting such a position would render the Act ineffective. Appendix A, p. 12.

This is an important question of federal law because is affects the interpretation of statutes in all federal cases dealing with violations of administrative regulations. The importance and number of such cases is increasing each year. Is the purpose of the Endangered Species Act, as enunciated by this Court in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), served by the strict regulation, with criminal penalties, of species which are not endangered or threatened?

This is also an important federal question with regard to due process. The failure to report, when one is without knowledge of the reporting requirements, must be classified as "nonfeasance" as opposed to "misfeasance." The purpose of all law, and the criminal law in particular, is to conform conduct to the norms expressed in that law. No useful end is served by prosecuting the "violators" when they have no knowledge of the law's provision. *United States v. Granada*, 565 F.2d 922, 926 (5th Cir. 1978). Due process requires knowledge of the law, or at least a general understanding of which activities are prohibited. In this case, failure to comply with the permit requirements of an international convention on endangered species for animal pelts of a species which was neither endangered nor threatened, must surely be classified as nonfeasance. As such, specific intent should be required for its violation.

CONCLUSION

The Fifth Circuit's ruling directly conflicts with the holdings of the Ninth Circuit, and this conflict must be resolved by this Court. The Fifth Circuit's ruling varies a statutory definition from its plain meaning, in the name of "Congressional intent." The Fifth Circuit's ruling also sets precedent that the terms of an international treaty can be violated by trade between a signatory and a non-signatory to that treaty. Furthermore, the Fifth Circuit's ruling sets precedent in holding that violations of an international treaty requires general and not specific intent. All these questions are uniquely suited for this Court to rule upon, and are important federal questions, not only in the context of this case, but also in the broader scope of statutory interpretation. For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8724

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK IVEY AND WILLIAM "RUSTY" WALLACE, III,

Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas

(December 17, 1991)

Before CLARK, Chief Judge, WILLIAMS and BARKSDALE, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

Appellants Jack Ivey and William "Rusty" Wallace, III were indicted and convicted of one count of conspiracy to buy bobcat hides brought into the United States from Mexico contrary to law and several counts of smuggling contrary to 16 U.S.C. § 1538(c)(1) and 50 C.F.R. § 23.11(b)(1). Both appellants assert that the jury verdict should be reversed due to defects in the indictment and the jury charge as well as insufficiency of the evidence. Appellant Ivey also appeals based on a claim of entrapment and outrageous government conduct. We find the

appellants' arguments unpersuasive and affirm the district court's ruling.

I. FACTS

The facts of this case are not in dispute. In 1986, the United States Fish and Wildlife Service received intelligence information that large numbers of bobcat hides were entering the country from Mexico in violation of United States law. In response, the government initiated an undercover operation to identify those individuals involved in the illegal fur trade. As part of the operation, the government opened a store named the "Van Horn Fur House." In addition, the government hired Tinsley Means, who had experience in the fur trade, to aid it in entering the stream of commerce of the fur trade.

John Keeler and Dan Marshall, agents of the Fish and Wildlife Service, were assigned to this project. They were to establish what is known as a "reverse sting." They were to purchase pelts they believed to have been trapped in Mexico and smuggled into the United States, and then they would resell those pelts to other fur buyers.

The investigation revealed the likelihood that Jack Ivey and William "Rusty" Wallace were involved in the trafficking of illegally smuggled furs. Ivey and Wallace were both employees of the D & W Fur Company in Alpine, Texas, and they had established an extensive network of trappers and other individuals to procure and smuggle Mexican bobcat furs into the United States. In order to conceal the illegal origin of the smuggled furs, Ivey and Wallace had established a pool of "trappers",

some legitimate and others who had never trapped, to sign tags certifying that bobcat pelts were taken in accordance with state and federal law. The trappers were paid for their signatures.

At trial various government witnesses, including Hernandez, Pando, Cabezuela, and Estrada, testified that they received smuggled furs from Mexico and sold them to Ivey and Wallace. The witnesses also testified that Ivey and Wallace knew these furs came from Mexico. Ivey and Wallace contend, however, that many of these witnesses also trapped furs in the United States, and it is impossible to tell where a bobcat had been trapped merely by looking at its pelt.

On December 22, 1986, Tinsley Means and Agent Keeler purchased bobcat hides from Flavio Estrada, a known dealer in Mexican furs. Means called Ivey and Wallace to arrange a meeting and solicit their business. Means first spoke to Ivey. Means indicated that some of the bobcat hides were from Mexico, and Ivey stated, "We don't want to buy none of that stuff. You known we can't. Huh? You know what I'm saying." Ivey also mentioned that the phone was not the place to talk about it. Means later called and spoke to Wallace, and a meeting was arranged.

At 10:30 p.m. on December 22, Means and Keeler met Ivey and Wallace at the Van Horn Holiday Inn. At the meeting, Wallace commented that he previously had seen some of the hides at Estrada's house. Keeler then announced his belief that some of the furs were from Mexico, and Wallace stated, "If someone tells me the furs are from Mexico, I don't buy them. . . . If you tell me

these furs are from Mexico, I am going to walk." This statement surprised Keeler because Wallace had often bought furs from Estrada, and the tags showed the furs were from Estrada.

On January 15, 1987, Wallace and Ivey returned to the Fur House. The men helped Means and Keeler unload furs which were contained in white sacks with Spanish writing on them. The agents mentioned that they would have had more furs except that part of the load was intercepted by Customs. Wallace inquired whether the furs were from Mexico. When the agents said they were, he said he was leaving. Wallace told the agents, "If I would have known you better, if I had gone to high school with you, maybe we would be doing business right now." Ivey told the agents that the "words" they used were wrong, and if they used the right words, they could do business in the future.

On February 4, 1987, Ivey and Wallace returned to the Fur House and purchased furs. The furs had Texas bobcat tags on them which require the trapper to sign a document stating that the bobcat was trapped in the United States. Ivey and Wallace also required the agents to sign a waiver certifying that the furs were legally taken. Agent Marshall signed the form and stated, "You all were good teachers the last time, we are good learners. If that is what it takes, I will sign it."

At trial Amos Cooper, the bobcat files coordinator for the Texas Parks and Wildlife Department, testified that in February 1987 Wallace called him to verify a rumor that there were two undercover agents working for the Van Horn Fur Company. Numerous trappers also testified

that Ivey and Wallace had warned them throughout the trapping season to be careful of federal agents.

On June 28, 1990, Ivey and Wallace were indicted in a seven-count superseding indictment charging them with:

> Count 1 – Conspiracy to receive, conceal, buy, sell, and facilitate the transportation, concealment, and sale, after importation of bobcat hides, knowing said hides had been brought into the United States from Mexico contrary to law.
>
> Counts 4, 5, 7 – Smuggling – violation of 18 U.S.C. § 545, receiving, concealing, buying, selling, and facilitating the transportation, concealment, and sale after importation of certain merchandise imported into the United States contrary to 16 U.S.C. § 1538(c)(1) and 50 C.F.R. § 23.11(b)(1).[1]

A jury found Ivey and Wallace both guilty on counts one, five, and seven of the indictment and, in addition, found Wallace guilty on count four. The district court

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[1] Counts 4, 5, and 7 of the indictment are each charging similar crimes. The only difference is that each count alleges a different date on which an offense was committed. Count 4 alleges a violation on December 18, 1986. Count 5 alleges a violation on December 22, 1986. Count 7 alleges a violation on February 2, 1988. It should also be noted that: (1) only Wallace was indicted on Count 4; (2) Counts 2 and 3 of the indictment did not charge the defendants, but, instead, charged a third defendant as to whom the charges were dismissed; and (3) Count 6 of the indictment was dismissed at the time of trial. Note that the statute covers actions other than purchasing. The charges on different dates involved different prohibited activities.

assessed terms of imprisonment for both Ivey and Wallace, and they now appeal.

II. INDICTMENT

Ivey and Wallace allege the indictment is defective for several reasons. First, they argue counts 4, 5, and 7 should have been dismissed for failing to state a criminal offense. In counts 4, 5, and 7, appellants were charged with violating 16 U.S.C. § 1538(c)(1) of the Endangered Species Act which states:

> It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any species contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in Article I thereof.

As defined in 16 U.S.C. § 1532(4), "the term 'Convention' means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, *signed on March 3, 1973*, and the appendices thereto." (emphasis added).

At the time the Convention was signed, the only bobcat listed in Appendix II as an endangered species was the *Felis lynx*. The bobcats in question in this case were not *Felis lynx*. The bobcats purchased by Ivey and Wallace were the common bobcat, or the *Felis rufus*. But that species had been added to Appendix II in February 1977.

The Convention standing alone is not the law of the United States because it is not self-executing. It is the implementing legislation, and not the treaty itself, which

is the law of the land. *See Man Hing Ivory & Imports, Inc. v. Deukmejian*, 702 F.2d 760, 762 (9th Cir. 1983). Ivey and Wallace maintain that the statute is clear, and, therefore, buying the bobcats in question was not illegal because the bobcats were not part of the Convention *signed on* March 3, 1973.

This argument is unconvincing. Appellant's argument would undermine the purpose of the Endangered Species Act which was to protect endangered species "whatever the cost." *See Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978). It would be contrary to the purpose of the act to view the Convention as a static document without the ability to add species as they become endangered or remove animals that are no longer endangered. Amendment of the appendices is necessary to guarantee that species may be added or deleted as required to ensure their protection.

Additionally, article XVII of the Convention specifically provides for amendments to the Convention. If 26 U.S.C. § 1532(4) defines the Convention as the Convention signed on March 3, 1973, and the Convention expressly made provisions for amendments, then the statute's definition included any amendments.

To our knowledge no court has addressed the issue of subsequent amendments with respect to the Endangered Species Act, but courts have addressed this issue in other contexts. The Ninth Circuit has held that when a federal statute adopts state law for an Indian reservation, the applicable law is the state law at the time an offense is committed, not the state law at the time the statute was

enacted. *United States v. Francisco*, 536 F.2d 1293, 1295-96 (9th Cir.), *cert. denied*, 429 U.S. 942, 97 S.Ct. 360, 50 L.Ed.2d 312 (1976). *See also, United States v. Howard*, 352 U.S. 212, 77 S.Ct. 303, 1 L.Ed.2d 261 (1957). The same theory applies in the present context. "Convention" as referred to in 16 U.S.C. § 1538(c)(1) refers to the Convention as of the date an offense is committed, not the Convention as of March 3, 1973.

Likewise, Ivey and Wallace argue that counts 4, 5, and 7 should be dismissed for failure to state a criminal offense because at all relevant times, the Republic of Mexico was not a party to the Convention. Ivey and Wallace failed to obtain an export permit, but because Mexico is not a party to the Convention it was not required to provide export permits. Appellants claim that because of the Republic of Mexico's status as a non-participant to the Convention, it is legally impossible for any export from Mexico of species listed in Appendix II and III to be contrary to the terms of the Convention. Therefore, appellants maintain, such exports cannot be in violation of 16 U.S.C. § 1538(c)(1).

Ivey and Wallace clearly misapply the Convention. Regardless of whether the Convention encompasses non-signatories, the Convention applies to trade within a signatory's jurisdiction. *Convention on International Trade in Endangered Species of Wild Fauna and Flora* ("CITES"), March 3, 1977, 27 U.S.T. 1087, T.I.A.S. No. 8249, arts. IV and X; 50 C.F.R. § 23.14(b) (1990). Pursuant to the terms of the Convention, United States law requires persons subject to its jurisdiction to obtain proper export permits from the country of origin establishing that the species

was lawfully taken. 50 C.F.R. § 23.14(b) (1990). The statute, therefore, does not subject Mexico to the terms of the Convention. Instead, it requires citizens within its jurisdiction to obtain the requisite permits from Mexico if they want to bring bobcat hides into the United States. It is up to the citizen to acquire them. The Convention specifically states, and caselaw has held, that the countries who are parties to the Convention may adopt domestic laws stricter than the measures required by the Convention. *CITES*, art. XIV; *Cayman Turtle Farm, Ltd. v. Andrus*, 478 F.Supp. 125, 130 (D. D.C. 1979).

As a final complaint as to the indictment, Ivey and Wallace maintain that Count 1 of the indictment was defective in that it failed to state an essential element of the conspiracy offense charged. In Count 1 of the Indictment, Ivey and Wallace were charged with conspiracy to violate 18 U.S.C. § 545, receiving bobcat hides brought into this country "contrary to law." Ivey and Wallace complain that the indictment does not state which elements of the law their actions violated, and, thus, it is incomplete.

The complaint that an indictment for conspiracy is flawed because it fails to allege the elements of the substantive crime "ignores literally decades of black-letter law to the contrary. . . . It is well settled that an indictment for conspiring to commit an offense – in which the conspiracy is the gist of the crime – it is not necessary to allege with technical precision all the elements essential to the commission of the offense which is the object of the conspiracy." *United States v. Graves*, 669 F.2d 964, 968 (5th Cir. 1982), *citing*, *Wong Tai v. United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 301-02, 71 L.Ed. 545 (1927)

The fundamental purpose of an indictment is to inform the defendant of the charges against him so that he may prepare an adequate defense. To be sufficient, an indictment for conspiracy must set out the essential elements of the charge and list the overt acts committed in furtherance of the conspiracy. *United States v. Gordon*, 780 F.2d 1165, 1170 (5th Cir. 1986). The essential element in a charge of conspiracy is the agreement between the parties. In Count 1 of the indictment in question, the government uses over two pages to describe the agreement and another two pages to describe in detail the overt acts in furtherance of the agreement. The Count went far beyond mere adequacy to apprise Ivey and Wallace of the charges against them and give them an opportunity to prepare a defense.

After a careful examination of the indictment as against all contentions, we conclude that the district court did not err in denying the motion to dismiss the indictment.

III. JURY CHARGE

Ivey and Wallace assert the trial judge's jury instructions were defective in two ways: failure to specify the elements of the crimes and failure to instruct as to the element of specific intent.

When reviewing the propriety of a jury instruction, this Court determines whether the charge, as a whole, is a correct statement of the law and whether it clearly instructed the jurors regarding the principles of law applicable to the factual issues before them. *United States v. Stacey*, 896 F.2d 75, 77 (5th Cir. 1990). It is well-settled

that as long as the jury charge accurately reflects the law and the facts of the case, a district judge is vested with broad discretion in formulating the charge, and this Court will not lightly disturb his judgment. *United States v. Casto*, 889 F.2d 562, 566 (5th Cir. 1989), *cert. denied*, 493 U.S. 1092, 110 S.Ct. 1164, 107 L.Ed.2d 1067 (1990). The determination of the adequacy of the charge must be made in the full context of the trial. *United States v. Rubio*, 834 F.2d 442, 447 (5th Cir. 1987).

Ivey and Wallace complain the jury instruction for the conspiracy count is defective for the same reason they claim the indictment was defective: the elements of the underlying substantive statutes or prohibitions were missing. An examination of the record indicates this argument is without merit. The charge instructed the jury that it must find that there was a conspiracy and that the defendants knowingly received and concealed merchandise imported into the United States, knowing that the merchandise was imported contrary to law. The jury was instructed that it was contrary to law to import bobcat pelts without proper permits. The charge properly apprises the jury of the elements and the underlying offense constituting the object of the conspiracy. This instruction is sufficient.

The other jury instruction error claim by Ivey and Wallace is that the trial judge erred in failing to instruct the jury that the statute required specific intent. They argue 16 U.S.C. § 1538(c) is a statute that requires knowledge of the law by the accused. Their argument is wrong. The words of Section 1538(c) as well as its legislative history indicate Congress did not intend for it to be a specific intent crime. "The conferees do not intend to

make knowledge of the law an element of either civil penalty or criminal violations of the [Endangered Species] Act." H.R.Conf.Rep. No. 1804, 95th Cong., 2d Sess. 26, *reprinted in* 1978 U.S.Code Cong. & Admin.News 9484, 9493.

No court has addressed the issue of whether 16 U.S.C. § 1538(c) is a specific intent statute, but the intent requirement of the related statute, 16 U.S.C. § 1540(b)(1), has been analyzed. Those cases held that the government must only show a defendant acted with general intent to commit the act because Congress did not intend to make knowledge of the law an element of criminal violations. *See United States v. Billie*, 667 F.Supp. 1485, 1492 (S.D. Fla. 1987); *United States v. St. Onge*, 676 F.Supp. 1044, 1045 (D. Mont. 1987).

Adopting the appellants' argument that Section 1538(c) requires specific intent would thwart the purpose of Congress in enacting the Endangered Species Act. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184, 98 S.Ct. 2279, 2297, 57 L.Ed.2d 117 (1978). *See also United States v. Nguyen*, 916 F.2d 1016, 1018-19 (5th Cir. 1990).

The requested instruction on specific intent would render the Act ineffective because it would be nearly impossible to show that an accused intended to violate the Act. The Act in question is a regulatory statute to preserve endangered species, and criminal penalties

attached to regulatory statutes should be construed to effectuate their regulatory purpose. *See United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208, 105 S.Ct. 1171, 84 L.Ed.2d 321 (1985).

IV. SUFFICIENCY OF THE EVIDENCE

Ivey and Wallace both challenge the sufficiency of the evidence to support their convictions, alleging the evidence was insufficient to show: (1) they knew the pelts were from Mexico; (2) the pelts actually had come from Mexico; (3) the pelts involved were pelts of an endangered species; or (4) the witnesses were credible. We will address each of these charges individually.[2]

In reviewing a challenge to the sufficiency of the evidence, this Court must determine whether a rational trier of fact could have found that the evidence established guilt beyond a reasonable doubt, and we view all evidence and any inferences that may be drawn from it in the light most favorable to the government. *United States v. Hatch*, 926 F.2d 387, 392 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 2239, 114 L.Ed.2d 481 (1991). "Circumstances altogether inconclusive, if separately considered, may, by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to

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[2] In his brief, Wallace in passing challenges the sufficiency of the evidence as to a violation of Count 4 of the indictment. He claims there is no evidence as to anything taking place on December 18, 1986. Because he did not raise this issue prior to appeal and because the sentences for all the counts are to run concurrently, we see no need to address this complaint.

constitute conclusive proof." *United States v. Ayala*, 887 F.2d 62, 67 (5th Cir. 1989) (quoting *Coggeshall v. United States*, 69 U.S. (2 Wall.) 383, 17 L.Ed. 911, 914-15 (1865)). The standard of review is the same whether the evidence is direct or circumstantial. *United States v. Bryant*, 770 F.2d 1283, 1288 (5th Cir. 1985), *cert. denied*, 475 U.S. 1030, 106 S.Ct. 1235, 89 L.Ed.2d 343 (1986).

Ivey and Wallace claim the evidence is insufficient to show they had knowledge the pelts were from Mexico. All the circumstantial evidence, however, when viewed together, is sufficient for the jury to conclude Ivey and Wallace had the requisite knowledge. The following individuals all testified that Ivey and Wallace knew the furs were from Mexico: Adan Hernandez, Mario Pando, Jose Cabezuela, Flavio Estrada, Ruben Ortega, Felipe Garcia, and John Keeler. Furthermore, the incident in which Ivey told Keeler that if he used the right words, they could do business in the future supports the conclusion that Ivey and Wallace had knowledge.

Appellants contend the evidence does not prove the pelts in question actually came from Mexico. It is impossible to tell whether a given hide is from Mexico or Texas, and, according to Ivey and Wallace, agent Keeler only believed the bobcat hides were illegal. He did not see the hides come across the border. If the hides were not from Mexico, then no laws were broken.

In support of the assertion that the hides came from Mexico, Felipe Garcia testified that he personally trapped two bobcats in Mexico and sold the hides to Ivey. Some of the hides in question were bought from a known dealer in Mexican furs. Telephone records were also submitted

into evidence showing calls placed by Ivey and Wallace to Amando Brito-Laura, a trapper in Mexico. Hernandez testified that Ivey and Wallace would often inform him when a shipment of furs would be arriving from Mexico. Furthermore, the furs were delivered in white sacks with Spanish writing on the sides, and several government witnesses testified that in their opinion they were convinced that the furs were from Mexico. Although much of the evidence is circumstantial, a review of the record as a whole shows there was evidence sufficient to uphold a jury verdict that the hides in question were from Mexico.

Ivey and Wallace also assert the evidence is insufficient to show the pelts in question are of a specific subspecies listed on Appendix II of the Convention. Throughout the trial, the pelts were referred to as "bobcat", "cat", "Coahuila cat", "Mexican cat", and "Mexican bobcat." Appellants believe the government failed in proving the animals involved were from a specific subspecies and that the subspecies is restricted by law. At trial, the judge instructed the jury that the hides were a species restricted by law, instead of letting the jury make that determination.

The argument is without merit. Appendix II of the Convention lists *Felidae spp.* which includes all species of cat exclusive of the common house cat. The question of whether a "bobcat" is a species listed in Appendix II is a question of law for the trial judge and was properly withheld from the jury's consideration. The testimony of the numerous trappers was sufficient to indicate they were dealing with a species of cat other than the common house cat.

Finally, Ivey and Wallace question the sufficiency of the evidence because of bias of government witnesses. Appellants assert that the evidence is insufficient because all of the government's witnesses had "an axe over their heads" and would testify to anything the government wanted out of fear of deportation or conviction for other crimes.

During cross-examination, Ivey and Wallace's attorneys questioned the witnesses as to their biases. The jury concluded that the witnesses were credible. It is the sole province of the jury, and not within the power of this Court, to weigh conflicting evidence and evaluate the credibility of witnesses. *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969) (en banc); *United States v. Martin*, 790 F.2d 1215, 1219 (5th Cir.), *cert. denied*, 479 U.S. 868, 107 S.Ct. 231, 93 L.Ed.2d 157 (1986); *United States v. Cantu*, 876 F.2d 1134, 1137 (5th Cir. 1989).

After a careful review of the entire record, we are convinced the evidence is sufficient to support the convictions of Ivey and Wallace.

V. ENTRAPMENT AND OUTRAGEOUS GOVERNMENT CONDUCT

Ivey, individually, alleges his conviction under count 5 should be reversed because of entrapment or, in the alternative, outrageous government conduct. Ivey requested a jury instruction on the defense of entrapment, but the trial judge did not grant this request. The trial court acted on the ground that the defense of entrapment was unavailable to a defendant as long as the defendant denied committing the acts which constituted the

crime. In so holding, the trial court followed the law of the circuit as it existed until 1988. *United States v. Henry*, 749 F.2d 203, 205 (5th Cir. 1984) (en banc). But the law had been changed at the time the defendants were tried in 1990. The Supreme Court held in *Mathews v. United States*, ___ U.S. ___, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988) that the entrapment defense was available to a defendant even though he or she denied committing the acts upon which the criminal charge is based. We implemented the holding in *United States v. Jones*, 839 F.2d 1041, 1053 (5th Cir.), *cert. denied*, 486 U.S. 1024, 108 S.Ct. 1999, 100 L.Ed.2d 230 (1988). There we said:

> [T]he Supreme Court now would permit a Defendant to assert entrapment while denying any or all elements of the crime, including intent. Hence, while the result in *Mathews* is not inconsistent with the *Henry* rule, we conclude that *Henry* is no longer controlling law in this circuit.

We conclude that the reason the trial judge used in refusing to give an instruction on entrapment was incorrect. But there remains the question whether there was error in failing to give the instruction. In all entrapment cases, the threshold question is the defendant's predisposition to commit the crime. Before the defense of entrapment can be raised, there must be a showing of government inducement and a lack of predisposition to engage in criminal conduct on the part of the defendant. *United States v. Cantu*, 876 F.2d 1134, 1137 (5th Cir. 1989); *United States v. Nissen*, 928 F.2d 690, 693 (5th Cir. 1991); *United States v. Kang*, 934 F.2d 621, 624 (5th Cir. 1991). The standard is the same in reverse sting operations. *United*

States v. Knight, 917 F.2d 1, 2 (5th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 533, 112 L.Ed.2d 543 (1990).

The evidence in this case amply supports the conclusion that Ivey was predisposed to purchase smuggled bobcat hides. It shows that Ivey and Wallace had established a network of trappers who falsely signed the bobcat tags stating that the bobcats were legally trapped. Ivey and Wallace also dealt with known dealers in Mexican furs. Telephone records presented at trial established that Ivey and Wallace made calls to contacts in Mexico, with the strong inference that they were arranging delivery of bobcat hides. Ivey's history in the fur business unmistakably evinces a predisposition to purchase bobcat hides from Mexico.

Similarly, Ivey cannot claim he was entrapped because he did not know these particular bobcat hides were from Mexico. At trial, numerous witnesses testified that Ivey knew the hides were from Mexico. In his brief, Ivey tries to discredit these witnesses' testimony because of their bias towards the government. But again, the credibility of these witnesses was decided by the jury. It is not a question for this Court. Ivey's knowledge that these furs were from Mexico can be deduced from his confrontation with Means and Keeler when he told them they used the wrong "words", and if they would use the right words, Ivey would do business with them in the future. Ivey later returned and bought the bobcats when the agents used the right words. Although it was not submitted under the guise of entrapment, the issue of whether Ivey knew the bobcats were imported contrary to law was submitted to the jury, and the jury determined that Ivey did know.

Thus, although the trial judge gave an incorrect reason for not instructing the jury on entrapment, no instruction was necessary. Based on the volume of evidence indicating Ivey's knowledge, and Ivey's predisposition as revealed by his prior dealings in Mexican bobcats, there was not enough evidence of entrapment to justify submitting the issue of entrapment to the jury. *See United States v. Stanley*, 765 F.2d 1224, 1235 (5th Cir. 1985) (holding that "the entrapment issue need not be presented to the jury if the evidence does not sufficiently raise the issue").

Ivey asserts that even if he was not entrapped the government's conduct was outrageous. Although a defendant may be predisposed to commit a crime, the government's conduct may be so outrageous as to violate the defendant's constitutional due process rights. This defense, however, is only available in the rarest and most outrageous circumstances. *United States v. Nissen*, 928 F.2d at 693; *United States v. Allibhai*, 939 F.2d 244, 248 (5th Cir. 1991); *United States v. Evans*, 941 F.2d 267, 271 (5th Cir. 1991).

Ivey claims the government's conduct was outrageous because the agents purchased bobcat hides believed to be illegally imported and then deliberately solicited other persons to buy the illegal furs. After being told by Ivey and Wallace that they did not want to purchase hides illegally imported from Mexico, the agents sold the furs to Ivey and Wallace and signed a form stating the furs were legal. Ivey asserts that it is outrageous conduct for the government to create, manufacture, or otherwise persuade an accused to engage in

illicit activity the government instigates for the sake of bringing charges against that person.

The government's activity in this case falls far short of that which is necessary to invoke the defense of outrageous government conduct. This Court previously has held that reverse sting operations do not constitute outrageous conduct. *United States v. Knight*, 917 F.2d at 2. We have also held that a defendant who actively participates in a crime cannot avail himself of the outrageous conduct defense. *United States v. Kang*, 934 F.2d at 629; *United States v. Nissen*, 928 F.2d at 693. Although the government initially contacted Ivey and Wallace, they kept returning even after being told the hides were from Mexico. By returning to purchase the furs, Ivey and Wallace were active participants.

In a recent case cited earlier, we denied the defense of outrageous conduct even though DEA agents approached the defendant and offered to help him manufacture drugs, phoned him to pursue the arrangement, supplied the expertise, sold the defendant equipment, and supplied him with the laboratory site. *United States v. Evans*, 941 F.2d at 270. The government's conduct in the *Evans* case is much more extreme than the conduct in this case.

Further, we are not persuaded by the fact that the government signed a form stating that the furs in question were legal. In *Nissen*, government agents remained silent when the defendants were told by another party that their actions were lawful. We denied the defense of outrageous conduct stating that we would not "consider the government's conduct in a vacuum. . . . Allegations of

outrageous government conduct are similarly unavailing where the defendant is actively and willingly participating in the criminal conduct leading to his arrest." *United States v. Nissen*, 928 F.2d at 693. Thus, the actions of Agents Keeler and Marshall do not constitute outrageous conduct.

VI. CONCLUSION

We hold the convictions of Ivey and Wallace must be upheld. The indictment was adequate to allow the appellants to prepare a defense, and the jury instruction properly explained the law to the members of the jury. The evidence was sufficient, when viewed cumulatively, to support the conviction. Furthermore, the claims of entrapment and outrageous conduct are unavailing. We affirm the judgment of the district court.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-8724

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JACK IVEY and WILLIAM "RUSTY" WALLACE, III,

Defendants-Appellants

Appeals from the United States District Court
for the Western District of Texas

ON PETITIONS FOR REHEARING AND
SUGGESTIONS FOR REHEARING EN BANC

(Opinion December 17, 1991,
5 Cir., 198_, ___F.2d___

(Feb. 14, 1992)

Before WILLIAMS and BARKSDALE, Circuit Judges.*

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* Chief Judge Charles Clark was a member of the original panel but resigned from the Court on January 15, 1992 and, therefore, did not participate in this decision. This matter is being decided by quorum. 28 U.S.C. 46(d).

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerre S. Williams
United States
Circuit Judge

CLERK'S NOTE:

SEE FRAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.
REHG-7

APPENDIX C

MULTILATERAL

International Trade in Endangered Species of Wild Fauna and Flora

Convention done at Washington March 3, 1973;

Ratification advised by the Senate of the United States of America August 3, 1973;

Ratified by the President of the United States of America September 13, 1973;

Ratification of the United States of America deposited with the Government of the Swiss Confederation January 14, 1974;

Proclaimed by the President of the United States of America May 12, 1975;

Entered into force July 1, 1975.

With procès-verbal correcting inconsistencies in text.

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BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A PROCLAMATION

CONSIDERING THAT:

The Convention on International Trade in Endangered Species of Wild Fauna and Flora was open for signature at Washington from March 3, 1973 to April 30, 1973, and thereafter at Bern until December 31, 1974, and was signed on behalf of the United States of America on March 3, 1973, a certified copy of which convention in the Chinese, English, French, Russian and Spanish languages, is hereto annexed;

The Senate of the United States of America by its resolution of August 3, 1973, two-thirds of the Senators present concurring therein, gave its advice and consent to ratification of the Convention;

The President of the United States of America on September 13, 1973, ratified the Convention, in pursuance of the advice and consent of the Senate, and the United States of America deposited its instrument of ratification with the Government of the Swiss Confederation on January 14, 1974;

Pursuant to the provisions of Article XXIII of the Convention, the Convention will enter into force on July 1, 1975;

NOW, THEREFORE, I, Gerald R. Ford, President of the United States of America, proclaim and make public the

Convention, to the end that it shall be observed and fulfilled with good faith on and after July 1, 1975, by the United States of America and by the citizens of the United States of America and all other persons subject to the jurisdiction thereof.

IN TESTIMONY WHEREOF, I have signed this proclamation and caused the Seal of the United States of America to be affixed.

DONE at the city of Washington this twelfth day of May in the year of our Lord one thousand nine hundred seventy-five and of the Independence of the United States of America the one hundred ninety-ninth.

[SEAL]

GERALD R. FORD

By the President:

HENRY A. KISSINGER
Secretary of State

CONVENTION ON INTERNATIONAL TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA

The Contracting States,

RECOGNIZING that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;

CONSCIOUS of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;

RECOGNIZING that peoples and States are and should be the best protectors of their own wild fauna and flora;

RECOGNIZING, in addition, that international cooperation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade;

CONVINCED of the urgency of taking appropriate measures to this end;

HAVE AGREED as follows:

ARTICLE I

Definitions

For the purpose of the present Convention, unless the context otherwise requires:

(a) "Species" means any species, subspecies, or geographically separate population thereof;

(b) "Specimen" means:

(i) any animal or plant, whether alive or dead;

(ii) in the case of an animal: for species included in Appendices I and II, any readily recognizable part or derivative thereof; and

for species included in Appendix III,[1] any readily recognizable part or derivative thereof specified in Appendix III in relation to the species; and

(iii) in the case of a plant: for species included in Appendix I, any readily recognizable part or derivative thereof; and for species included in Appendices II and III, any readily recognizable part or derivative thereof specified in Appendices II and III in relation to the species;

(c) "Trade" means export, re-export, import and introduction from the sea;

(d) "Re-export" means export of any specimen that has previously been imported;

(e) "Introduction from the sea" means transportation into a State of specimens of any species which were taken in the marine environment not under the jurisdiction of any State;

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[1] See Articles V and XVI. As Appendix III is to be composed of species identified by any party to the Convention rather than by agreement of the parties as is the case for the other Appendices, the Conference which produced the Convention concluded that Appendix III could only be established after the Convention had entered into force and the "parties" were identified and even then it would be subject to nearly continuous revision. As of this printing the Secretariat has not promulgated an Appendix III. [footnote added by the Department of State.]

(f) "Scientific Authority" means a national scientific authority designated in accordance with Article IX;

(g) "Management Authority" means a national management authority designated in accordance with Article IX;

(h) "Party" means a State for which the present Convention has entered into force.

ARTICLE II

Fundamental Principles

1. Appendix I shall include all species threatened with extinction which are or may be affected by trade. Trade in specimens of these species must be subject to particularly strict regulation in order not to endanger further their survival and must only be authorized in exceptional circumstances.

2. Appendix II shall include:

(a) all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival; and

(b) other species which must be subject to regulation in order that trade in specimens of certain species referred to in sub-paragraph (a) of this paragraph may be brought under effective control.

3. Appendix III shall include all species which any Party identifies as being subject to regulation within its jurisdiction for the purpose of preventing or restricting

exploitation, and as needing the cooperation of other parties in the control of trade.

4. The Parties shall not allow trade in specimens of species included in Appendices I, II and III except in accordance with the provisions of the present Convention.

ARTICLE III

Regulation of Trade in Specimens of Species included in Appendix I

1. All trade in specimens of species included in Appendix I shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix I shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;

(b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora;

(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(d) a Management Authority of the State of export is satisfied that an import permit has been granted for the specimen.

3. The import of any specimen of a species included in Appendix I shall require the prior grant and presentation of an import permit and either an export permit or a re-export certificate. An import permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of import has advised that the import will be for purposes which are not detrimental to the survival of the species involved;

(b) a Scientific Authority of the State of import is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of import is satisfied that the specimen is not to be used for primarily commercial purposes.

4. The re-export of any specimen of a species included in Appendix I shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention;

(b) a Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment; and

(c) a Management Authority of the State of re-export is satisfied that an import permit has been granted for any living specimen.

5. The introduction from the sea of any specimen of a species included in Appendix I shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved;

(b) a Management Authority of the State of introduction is satisfied that the proposed recipient of a living specimen is suitably equipped to house and care for it; and

(c) a Management Authority of the State of introduction is satisfied that the specimen is not to be used for primarily commercial purposes.

ARTICLE IV

Regulation of Trade in Specimens of Species included in Appendix II

1. All trade in specimens of species included in Appendix II shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix II shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;

(b) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and

(c) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

3. A Scientific Authority in each Party shall monitor both the export permits granted by that State for specimens of species included in Appendix II and the actual exports of such specimens. Whenever a Scientific Authority determines that the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystems in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I, the Scientific Authority shall advise the appropriate Management Authority of suitable measures to be taken to limit the grant of export permits for specimens of that species.

4. The import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate.

5. The re-export of any specimen of a species included in Appendix II shall require the prior grant and presentation of a re-export certificate. A re-export certificate shall

only be granted when the following conditions have been met:

(a) a Management Authority of the State of re-export is satisfied that the specimen was imported into that State in accordance with the provisions of the present Convention; and

(b) a Management Authority of the State of re-export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

6. The introduction from the sea of any specimen of a species included in Appendix II shall require the prior grant of a certificate from a Management Authority of the State of introduction. A certificate shall only be granted when the following conditions have been met:

(a) a Scientific Authority of the State of introduction advises that the introduction will not be detrimental to the survival of the species involved; and

(b) a Management Authority of the State of introduction is satisfied that any living specimen will be so handled as to minimize the risk of injury, damage to health or cruel treatment.

7. Certificates referred to in paragraph 6 of this Article may be granted on the advice of a Scientific Authority, in consultation with other national scientific authorities or, when appropriate, international scientific authorities, in respect of periods not exceeding one year for total numbers of specimens to be introduced in such periods.

ARTICLE V

Regulation of Trade in Specimens of Species included in Appendix III

1. All trade in specimens of species included in Appendix III shall be in accordance with the provisions of this Article.

2. The export of any specimen of a species included in Appendix III from any State which has included that species in Appendix III shall require the prior grant and presentation of an export permit. An export permit shall only be granted when the following conditions have been met:

(a) a Management Authority of the State of export is satisfied that the specimen was not obtained in contravention of the laws of that State for the protection of fauna and flora; and

(b) a Management Authority of the State of export is satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment.

3. The import of any specimen of a species included in Appendix III shall require, except in circumstances to which paragraph 4 of this Article applies, the prior presentation of a certificate of origin and, where the import is from a State which has included that species in Appendix III, an export permit.

4. In the case of re-export, a certificate granted by the Management Authority of the State of re-export that the specimen was processed in that State or is being re-exported shall be accepted by the State of import as

evidence that the provisions of the present Convention have been complied with in respect of the specimen concerned.

ARTICLE VI

Permits and Certificates

1. Permits and certificates granted under the provisions of Articles III, IV, and V shall be in accordance with the provisions of this Article.

2. An export permit shall contain the information specified in the model set forth in Appendix IV, and may only be used for export within a period of six months from the date on which it was granted.

3. Each permit or certificate shall contain the title of the present Convention, the name and any identifying stamp of the Management Authority granting it and a control number assigned by the Management Authority.

4. Any copies of a permit or certificate issued by a Management Authority shall be clearly marked as copies only and no such copy may be used in place of the original, except to the extent endorsed thereon.

5. A separate permit or certificate shall be required for each consignment of specimens.

6. A Management Authority of the State of import of any specimen shall cancel and retain the export permit or re-export certificate and any corresponding import permit presented in respect of the import of that specimen.

7. Where appropriate and feasible a Management Authority may affix a mark upon any specimen to assist

in identifying the specimen. For these purposes "mark" means any indelible imprint, lead seal or other suitable means of identifying a specimen, designed in such a way as to render its imitation by unauthorized persons as difficult as possible.

ARTICLE VII

Exemptions and Other Special Provisions Relating to Trade

1. The provisions of Articles III, IV and V shall not apply to the transit or trans-shipment of specimens through or in the territory of a Party while the specimens remain in Customs control.

2. Where a Management Authority of the State of export or re-export is satisfied that a specimen was acquired before the provisions of the present Convention applied to that specimen, the provisions of Articles III, IV and V shall not apply to that specimen where the Management Authority issues a certificate to that effect.

3. The provisions of Articles III, IV and V shall not apply to specimens that are personal or household effects. This exemption shall not apply where:

(a) in the case of specimens of a species included in Appendix I, they were acquired by the owner outside his State of usual residence, and are being imported into that State; or

(b) in the case of specimens of species included in Appendix II:

(i) they were acquired by the owner outside his State of usual residence and

in a State where removal from the wild occurred;

(ii) they are being imported into the owner's State of usual residence; and

(iii) the State where removal from the wild occurred requires the prior grant of export permits before any export of such specimens;

unless a Management Authority is satisfied that the specimens were acquired before the provisions of the present Convention applied to such specimens.

4. Specimens of an animal species included in Appendix I bred in captivity for commercial purposes, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens of species included in Appendix II.

5. Where a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity or any specimen of a plant species was artificially propagated, or is a part of such an animal or plant or was derived therefrom, a certificate by that Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Articles III, IV or V.

6. The provisions of Articles III, IV and V shall not apply to the non-commercial loan, donation or exchange between scientists or scientific institutions registered by a Management Authority of their State, of herbarium specimens, other preserved, dried or embedded museum specimens, and live plant material which carry a label issued or approved by a Management Authority.

7. A Management Authority of any State may waive the requirements of Articles III, IV and V and allow the movement without permits or certificates of specimens which form part of a travelling zoo, circus, menagerie, plant exhibition or other travelling exhibition provided that:

(a) the exporter or importer registers full details of such specimens with that Management Authority;

(b) the specimens are in either of the categories specified in paragraphs 2 or 5 of this Article; and

(c) the Management Authority is satisfied that any living specimen will be so transported and cared for as to minimize the risk of injury, damage to health or cruel treatment.

ARTICLE VIII

Measures to be Taken by the Parties

1. The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures:

(a) to penalize trade in, or possession of, such specimens, or both; and

(b) to provide for the confiscation or return to the State of export of such specimens.

2. In addition to the measures taken under paragraph 1 of this Article, a Party may, when it deems it necessary, provide for any method of internal reimbursement for expenses incurred as a result of the confiscation of a

specimen traded in violation of the measures taken in the application of the provisions of the present Convention.

3. As far as possible, the Parties shall ensure that specimens shall pass through any formalities required for trade with a minimum of delay. To facilitate such passage, a Party may designate ports of exit and ports of entry at which specimens must be presented for clearance. The Parties shall ensure further that all living specimens, during any period of transit, holding or shipment, are properly cared for so as to minimize the risk of injury, damage to health or cruel treatment.

4. Where a living specimen is confiscated as a result of measures referred to in paragraph 1 of this Article:

(a) the specimen shall be entrusted to a Management Authority of the State of confiscation;

(b) the Management Authority shall, after consultation with the State of export, return the specimen to that State at the expense of that State, or to a rescue centre or such other place as the Management Authority deems appropriate and consistent with the purposes of the present Convention; and

(c) the Management Authority may obtain the advice of a Scientific Authority, or may, whenever it considers it desirable, consult the Secretariat in order to facilitate the decision under subparagraph (b) of this paragraph, including the choice of a rescue centre or other place.

5. A rescue centre as referred to in paragraph 4 of this Article means an institution designated by a Management

Authority to look after the welfare of living specimens, particularly those that have been confiscated.

6. Each Party shall maintain records of trade in specimens of species included in Appendices I, II and III which shall cover:

(a) the names and addresses of exporters and importers; and

(b) the number and type of permits and certificates granted; the States with which such trade occurred; the numbers or quantities and types of specimens, names of species as included in Appendices I, II and III and, where applicable, the size and sex of the specimens in question.

7. Each Party shall prepare periodic reports on its implementation of the present Convention and shall transmit to the Secretariat:

(a) an annual report containing a summary of the information specified in sub-paragraph (b) of paragraph 6 of this Article; and

(b) a biennial report on legislative, regulatory and administrative measures taken to enforce the provisions of the present Convention.

8. The information referred to in paragraph 7 of this Article shall be available to the public where this is not inconsistent with the law of the Party concerned.

ARTICLE IX

Management and Scientific Authorities

1. Each Party shall designate for the purpose of the present Convention:

(a) one or more Management Authorities competent to grant permits or certificates on behalf of that Party; and

(b) one or more Scientific Authorities.

2. A State depositing an instrument of ratification, acceptance, approval or accession shall at that time inform the Depositary Government of the name and address of the Management Authority authorized to communicate with other Parties and with the Secretariat.

3. Any changes in the designations or authorizations under the provisions of this Article shall be communicated by the Party concerned to the Secretariat for transmission to all other Parties.

4. Any Management Authority referred to in paragraph 2 of this Article shall if so requested by the Secretariat or the Management Authority of another Party, communicate to it impression of stamps, seals or other devices used to authenticate permits or certificates.

ARTICLE X

Trade with States not Party to the Convention

Where export or re-export is to, or import is from, a State not a party to the present Convention, comparable documentation issued by the competent authorities in

that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party.

ARTICLE XI

Conference of the Parties

1. The Secretariat shall call a meeting of the Conference of the Parties not later than two years after the entry into force of the present Convention.

2. Thereafter the Secretariat shall convene regular meetings at least once every two years, unless the Conference decides otherwise, and extraordinary meetings at any time on the written request of at least one-third of the Parties.

3. At meetings, whether regular or extraordinary, the Parties shall review the implementation of the present Convention and may:

(a) make such provision as may be necessary to enable the Secretariat to carry out its duties;

(b) consider and adopt amendments to Appendices I and II in accordance with Article XV;

(c) review the progress made towards the restoration and conservation of the species included in Appendices I, II and III;

(d) receive and consider any reports presented by the Secretariat or by any Party; and

(e) where appropriate, make recommendations for improving the effectiveness of the present Convention.

4. At each regular meeting, the Parties may determine the time and venue of the next regular meeting to be held in accordance with the provisions of paragraph 2 of this Article.

5. At any meeting, the Parties may determine and adopt rules of procedure for the meeting.

6. The United Nations, its Specialized Agencies and the International Atomic Energy Agency, as well as any State not a Party to the present Convention, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

7. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object;

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located. Once admitted, these observers shall have the right to participate but not to vote.

ARTICLE XII

The Secretariat

1. Upon entry into force of the present Convention, a Secretariat shall be provided by the Executive Director of

the United Nations Environment Programme. To the extent and in the manner he considers appropriate, he may be assisted by suitable inter-governmental or non-governmental international or national agencies and bodies technically qualified in protection, conservation and management of wild fauna and flora.

2. The functions of the Secretariat shall be:

(a) to arrange for and service meetings of the Parties;

(b) to perform the functions entrusted to it under the provisions of Articles XV and XVI of the present Convention;

(c) to undertake scientific and technical studies in accordance with programmes authorized by the Conference of the Parties as will contribute to the implementation of the present Convention, including studies concerning standards for appropriate preparation and shipment of living specimens and the means of identifying specimens;

(d) to study the reports of Parties and to request from Parties such further information with respect thereto as it deems necessary to ensure implementation of the present Convention;

(e) to invite the attention of the Parties to any matter pertaining to the aims of the present Convention;

(f) to publish periodically and distribute to the Parties current editions of Appendices I, II and III together with any information which will facilitate identification of specimens of species included in those Appendices.

(g) to prepare annual reports to the Parties on its work and on the implementation of the present Convention and such other reports as meetings of the Parties may request;

(h) to make recommendations for the implementation of the aims and provisions of the present Convention, including the exchange of information of a scientific or technical nature;

(i) to perform any other function as may be entrusted to it by the Parties.

ARTICLE XIII

International Measures

1. When the Secretariat in the light of information received is satisfied that any species included in Appendices I or II is being affected adversely by trade in specimens of that species or that the provisions of the present Convention are not being effectively implemented, it shall communicate such information to the authorized Management Authority of the Party or Parties concerned.

2. When any Party receives a communication as indicated in paragraph 1 of this Article, it shall, as soon as possible, inform the Secretariat of any relevant facts insofar as its laws permit and, where appropriate, propose remedial action. Where the Party considers that an inquiry is desirable, such inquiry may be carried out by one or more persons expressly authorized by the Party.

3. The information provided by the Party or resulting from any inquiry as specified in paragraph 2 of this Article shall be reviewed by the next Conference of the

Parties which may make whatever recommendations it deems appropriate.

ARTICLE XIV

Effect on Domestic Legislation and International Conventions

1. The provisions of the present Convention shall in no way affect the right of Parties to adopt:

(a) stricter domestic measures regarding the conditions for trade, taking possession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof; or

(b) domestic measures restricting or prohibiting trade, taking possession, or transport of species not included in Appendices I, II or III.

2. The provisions of the present Convention shall in no way affect the provisions of any domestic measures or the obligations of Parties deriving from any treaty, convention, or international agreement relating to other aspects of trade, taking, possession, or transport of specimens which is in force or subsequently may enter into force for any Party including any measure pertaining to the Customs, public health, veterinary or plant quarantine fields.

3. The provisions of the present Convention shall in no way affect the provisions of, or the obligations deriving from, any treaty, convention or international agreement concluded or which may be concluded between States creating a union or regional trade agreement establishing or maintaining a common external customs control and removing customs control between the parties thereto

insofar as they relate to trade among the States members of that union or agreement.

4. A State party to the present Convention, which is also a party to any other treaty, convention or international agreement which is in force at the time of the coming into force of the present Convention and under the provisions of which protection is afforded to marine species included in Appendix II, shall be relieved of the obligations imposed on it under the provisions of the present Convention with respect to trade in specimens of species included in Appendix II that are taken by ships registered in that State and in accordance with the provisions of such other treaty, convention or international agreement.

5. Notwithstanding the provisions of Articles III, IV and V, any export of a specimen taken in accordance with paragraph 4 of this Article shall only require a certificate from a Management Authority of the State of introduction to the effect that the specimen was taken in accordance with the provisions of the other treaty, convention or international agreement in question.

6. Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea convened pursuant to Resolution 2750 C (XXV) of the General Assembly of the United Nations nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.

ARTICLE XV

Amendments to Appendices I and II

1. The following provisions shall apply in relation to amendments to Appendices I and II at meetings of the Conference of the Parties:

(a) Any Party may propose an amendment to Appendix I or II for consideration at the next meeting. The text of the proposed amendment shall be communicated to the Secretariat at least 150 days before the meeting. The Secretariat shall consult the other Parties and interested bodies on the amendment in accordance with the provisions of sub-paragraphs (b) and (c) of paragraph 2 of this Article and shall communicate the response to all Parties not later than 30 days before the meeting.

(b) Amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two-thirds required for adopting an amendment.

(c) Amendments adopted at a meeting shall enter into force 90 days after that meeting for all Parties except those which made a reservation in accordance with paragraph 3 of this Article.

2. The following provisions shall apply to relation to amendments to Appendices I and II between meetings of the Conference of the Parties:

(a) Any Party may propose an amendment to Appendix I or II for consideration between meetings by the postal procedures set forth in this paragraph.

(b) For marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties. It shall also consult inter-governmental bodies having a function in relation to those species especially with a view to obtaining scientific data these bodies may be able to provide and to ensuring coordination with any conservation measures enforced by such bodies. The Secretariat shall communicate the views expressed and data provided by these bodies and its own findings and recommendations to the Parties as soon as possible.

(c) For species other than marine species, the Secretariat shall, upon receiving the text of the proposed amendment, immediately communicate it to the Parties, and, as soon as possible thereafter, its own recommendations.

(d) Any Party may, within 60 days of the date on which the Secretariat communicated its recommendations to the Parties under sub-paragraphs (b) or (c) of this paragraph, transmit to the Secretariat any comments on the proposed amendment together with any relevant scientific data and information.

(e) The Secretariat shall communicate the replies received together with its own recommendations to the Parties as soon as possible.

(f) If no objection to the proposed amendment is received by the Secretariat within 30 days of the date the replies and recommendations were communicated under the provisions of sub-paragraph (e) of this paragraph, the amendment shall enter into force 90 days later for all

Parties except those which make a reservation in accordance with paragraph 3 of this Article.

(g) If an objection by any Party is received by the Secretariat, the proposed amendment shall be submitted to a postal vote in accordance with the provisions of sub-paragraphs (h), (i) and (j) of this paragraph.

(h) The Secretariat shall notify the Parties that notification of objection has been received.

(i) Unless the Secretariat receives the votes for, against or in abstention from at least one-half of the Parties within 60 days of the date of notification under sub-paragraph (h) of this paragraph, the proposed amendment shall be referred to the next meeting of the Conference for further consideration.

(j) Provided that votes are received from one-half of the Parties, the amendment shall be adopted by a two-thirds majority of Parties casting an affirmative or negative vote.

(k) The Secretariat shall notify all Parties of the result of the vote.

(l) If the proposed amendment is adopted it shall enter into force 90 days after the date of the notification by the Secretariat of its acceptance for all Parties except those which make a reservation in accordance with paragraph 3 of this Article.

3. During the period of 90 days provided for by sub-paragraph (c) of paragraph 1 or sub-paragraph (l) of paragraph 2 of this Article any Party may be notification

in writing to the Depository Government make a reservation with respect to the amendment. Until such reservation is withdrawn the Party shall be treated as a State not a party to the present Convention with respect to trade in the species concerned.

ARTICLE XVI

Appendix III and Amendments thereto

1. Any party may at any time submit to the Secretariat a list of species which it identifies as being subject to regulation within its jurisdiction for the purpose mentioned in paragraph 3 of Article II. Appendix III shall include the names of the Parties submitting the species for inclusion therein, the scientific names of the species so submitted, and any parts or derivatives of the animals or plants concerned that are specified in relation to the species for the purposes of sub-paragraph (b) of Article I.

2. Each list submitted under the provisions of paragraph 1 of this Article shall be communicated to the Parties by the Secretariat as soon as possible after receiving it. The list shall take effect as part of Appendix III 90 days after the date of such communication. At any time after the communication of such list, any Party may by notification in writing to the Depository Government enter a reservation with respect to any species or any parts or derivatives, and until such reservation is withdrawn, the State shall be treated as a State not a Party to the present Convention with respect to trade in the species or part or derivative concerned.

3. A Party which has submitted a species for inclusion in Appendix III may withdraw it at any time by notification to the Secretariat which shall communicate the withdrawal to all Parties. The withdrawal shall take effect 30 days after the date of such communication.

4. Any Party submitting a list under the provisions of paragraph 1 of this Article shall submit to the Secretariat a copy of all domestic laws and regulations applicable to the protection of such species, together with any interpretations which the Party may deem appropriate or the Secretariat may request. The Party shall, for as long as the species in question is included in Appendix III, submit any amendments of such laws and regulations or any new interpretations as they are adopted.

ARTICLE XVII
Amendment of the Convention

1. An extraordinary meeting of the Conference of the Parties shall be convened by the Secretariat on the written request of at least one-third of the Parties to consider and adopt amendments to the present Convention. Such amendments shall be adopted by a two-thirds majority of Parties present and voting. For these purposes "Parties present and voting" means Parties present and casting an affirmative or negative vote. Parties abstaining from voting shall not be counted among the two-thirds required for adopting an amendment.

2. The text of any proposed amendment shall be communicated by the Secretariat to all Parties at least 90 days before the meeting.

3. An amendment shall enter into force for the Parties which have accepted it 60 days after two-thirds of the Parties have deposited an instrument of acceptance of the amendment with the Depository Government. Thereafter, the amendment shall enter into force for any other Party 60 days after that Party deposits its instrument of acceptance of the amendment.

ARTICLE XVIII
Resolution of Disputes

1. Any dispute which may arise between two or more Parties with respect to the interpretation or application of the provisions of the present Convention shall be subject to negotiation between the Parties involved in the dispute.

2. If the dispute cannot be resolved in accordance with paragraph 1 of this Article, the Parties may, by mutual consent, submit the dispute to arbitration, in particular that of the Permanent Court of Arbitration at The Hague, and the Parties submitting the dispute shall be bound by the arbitral decision.

ARTICLE XIX
Signature

The present Convention shall be open for signature at Washington until 30th April 1973 and thereafter at Berne until 31st December 1974.

ARTICLE XX
Ratification, Acceptance, Approval

The present Convention shall be subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Government of the Swiss Confederation which shall be the Depository Government.

ARTICLE XXI
Accession

The present Convention shall be open indefinitely for accession. Instruments of accession shall be deposited with the Depository Government.

ARTICLE XXII
Entry into Force

1. The present Convention shall enter into force 90 days after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession, with the Depository Government.[1]

2. For each State which ratifies, accepts or approves the present Convention or accedes thereto after the deposit of the tenth instrument of ratification, acceptance, approval, or accession, the present Convention shall enter into force 90 days after the deposit by such State of its instrument of ratification, acceptance, approval or accession.

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[1] July 1, 1975. [Footnote added by the Department of State.]

ARTICLE XXIII
Reservations

1. The provisions of the present Convention shall not be subject to general reservations. Specific reservations may be entered in accordance with the provisions of this Article and Articles XV and XVI.

2. Any State may, on depositing its instrument of ratification, acceptance, approval or accession, enter a specific reservation with regard to:

(a) any species included in Appendix I, II or III; or

(b) any parts or derivatives specified in relation to a species included in Appendix III.

3. Until a Party withdraws its reservation entered under the provisions of this Article, it shall be treated as a State not a party to the present Convention with respect to trade in the particular species or parts or derivatives specified in such reservation.

ARTICLE XXIV
Denunciation

Any party may denounce the present Convention by written notification to the Depository Government at any time. The denunciation shall take effect twelve months after the Depository Government has received the notification.

ARTICLE XXV
Depository

1. The original of the present Convention, in the Chinese, English, French, Russian and Spanish languages, each version being equally authentic, shall be deposited with the Depository Government, which shall transmit certified copies thereof to all States that have signed it or deposited instruments of accession to it.

2. The Depository Government shall inform all signatory and acceding States and the Secretariat of signatures, deposit of instruments of ratification, acceptance, approval or accession, entry into force of the present Convention, amendments thereto, entry and withdrawal of reservations and notifications of denunciation.

3. As soon as the present Convention enters into force, a certified copy thereof shall be transmitted by the Depository Government to the Secretariat of the United Nations for registration and publication in accordance with Article 102 of the Charter of the United Nations.[2]

IN WITNESS WHEREOF the undersigned Plenipotentiaries, being duly authorized to that effect, have signed the present Convention.

DONE at Washington this third day of March, One Thousand Nine Hundred and Seventy-three.

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[2] TS 993; 59 Stat. 1052. [Footnote added by the Department of State.]

APPENDIX II

Interpretation:

1. Species included in this Appendix are referred to:

(a) by the name of the species; or

(b) as being all of the species included in a higher taxon or designated part thereof.

2. The abbreviation "spp." is used to denote all the species of a higher taxon.

3. Other references to taxa higher than species are for the purposes of information or classification only.

4. An asterisk (*) placed against the name of a species or higher taxon indicates that one or more geographically separate populations, sub-species or species of that taxon are included in Appendix I and that these populations, sub-species or species are excluded from Appendix II.

5. The symbol (#) followed by a number placed against the name of a species or higher taxon designates parts or derivatives which are specified in relation thereto for the purposes of the present Convention as follows:

1 designates root

2 designates timber

3 designates trunks

6. The symbol (-) followed by a number placed against the name of a species or higher taxon indicates the exclusion from that species or taxon of designated geographically separate populations, sub-species, species or groups of species as follows:

- 101 Species which are not succulents

7. The symbol (+) followed by a number placed against the name of a species or higher taxon denotes that only designated geographically separate populations, sub-species or species of that species or taxon are included in this Appendix as follows:

+ 201 All North American sub-species
+ 202 New Zealand species
+ 203 All species of the family in the Americas
+ 204 Australian population.

Sciuridae	*Ratufa* spp.
	Lariscus hosei
Castoridae	*Castor canadensis frondator*
	Castor canadensis repentinus
Cricetidae	*Ondatra zibethicus bernardi*
CARNIVORA	
Canidae	*Canis lupus pallipes*
	Canis lupus irremotus
	Canis lupus crassodon
	Chrysocyon brachyurus
	Cuon alpinus
Ursidae	*Ursus (Thalarctos) maritimus*
	Ursus arctos * +201
	Helarctos-malayanus
Procyonidae	*Ailurus fulgens*
Mustelidae	*Martes americana atrata*

Viveridae	*Prionodon linsang*
	Cynogale bennetti
	Helogale derbianus
Felidae	*Felis yagouaroundi* *
	Felis colocolo pajeros
	Felis colocolo crespoi
	Felis colocolo budini
	Felis colocolo missoulensis
	Felis colocolo mayensis
	Felis colocolo azteca
	Felis serval
	Felis lynx isabellina
	Felis wiedii *
	Felis pardalis *
	Felis tigrina *
	Felis *(=Caracal) caracal*
	Panthera leo persica
	Panthera tigris altaica (=amurensis)
PINNIPEDIA	
Otariidae	*Arctocephalus australis*
	Arctocephalus galapagoensis
	Arctocephalus philippii
	Arctocephalus townsendi
Phocidae	*Mirounga australis*
	Mirounga leonina

(2)

No. 91-1854

Supreme Court, U
FILED
JUL 17 1992

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM "RUSTY" WALLACE, III, AND
JACK IVEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR,
Solicitor General

ROGER CLEGG
Acting Assistant Attorney General

JOHN A. BRYSON
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Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in ruling as a matter of law that bobcats are covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Convention).

2. Whether a showing of general intent is sufficient to support a criminal conviction for violating the Endangered Species Act (ESA), 16 U.S.C. 1531-1544.

3. Whether the definition of "Convention" in the ESA as "the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto," encompasses amendments to the Convention's appendices.

4. Whether the Convention applies to the importation of specimens into the United States from a non-signatory nation.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1854

WILLIAM "RUSTY" WALLACE, III, AND
JACK IVEY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 949 F.2d 759.

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1991. Petitions for rehearing were denied on February 14, 1992. Pet. App. 22a-23a. The petition for a writ of certiorari was filed on May 14, 1992. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Texas, petitioner Wallace was convicted of conspiracy to receive bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 371, and three counts of receiving bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 545. Petitioner Ivey was convicted of conspiracy to receive bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 371, and two counts of receiving bobcat hides knowing they had been imported illegally into the United States, in violation of 18 U.S.C. 545.

Petitioner Wallace was sentenced to five years' imprisonment, to be followed by a three-year period of supervised release, and was ordered to pay a $15,000 fine. Petitioner Ivey was sentenced to five years' imprisonment, to be followed by a three-year period of supervised release, and was ordered to pay a $5,000 fine. Gov't C.A. Br. 3. The court of appeals affirmed.

1. The United States is a party to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Convention), Mar. 3, 1973, 27 U.S.T. 1087, T.I.A.S. No. 8249, 993 U.N.T.S. 243, which regulates international trade in specimens of certain plant and animal species. See Pet. App. 24a-61a. The Convention classifies protected species into three groups that are subject to differing degrees of protection; the species that are members of each group are listed in separate appendices.

The Convention expressly provides for amendment of the appendices listing the various classes of protected species. Convention arts. XV, XVI, 27 U.S.T. 1110-1114; Pet. App. 50a-54a. When the Convention was signed in

1973, the only bobcat listed in the appendices was the *Felis lynx*. In November 1976, however, Appendix II was amended to include all species of cat not already included in other appendices, with the exception of the common house cat. 42 Fed. Reg. 10,469 (1977); 50 C.F.R. 23.23(f). Thus, the 1976 amendment added the common bobcat (*Felis rufus*) to Appendix II, and trade in bobcats then became subject to the conditions imposed on trade in any Appendix II species.

Congress implemented the Convention in the Endangered Species Act (ESA), 16 U.S.C. 1531-1544. See 16 U.S.C. 1531(a)(4)(F). The ESA provides that it is "unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention." 16 U.S.C. 1538(c)(1).

2. In 1986, the United States Fish and Wildlife Service received information that large numbers of bobcat hides were illegally entering the country from Mexico. In response, the Fish and Wildlife Service initiated an investigation to identify the individuals involved in the illegal fur trade and to interdict the flow of illegally imported hides. As part of the investigation, Fish and Wildlife agents opened a covert store-front operation named the "Van Horn Fur House." Pet. App. 2a.

The investigation revealed that petitioners were involved in trafficking in illegally smuggled furs, including numerous bobcat hides. Pet. App. 2a. On December 22, 1986, government agents purchased bobcat hides and other furs from Flavio Estrada, a known dealer in Mexican furs. The agents then arranged a meeting with petitioners. *Id.* at 3a.

At the meeting, petitioner Wallace stated that he had seen some of the hides at Estrada's house. Pet. App. 3a. After one of the agents indicated that some of the hides

were from Mexico, Wallace stated, "If someone tells me the furs are from Mexico, I don't buy them," and "If you tell me these furs are from Mexico, I am going to walk." *Id.* at 3a-4a.

On January 15, 1987, petitioners arrived at the Van Horn Fur House, and helped the agents unload furs contained in white sacks with Spanish writing on them. Petitioner Wallace asked whether the furs were from Mexico, and the agents responded that they were. Petitioner Wallace then told the agents that he was leaving, and observed, "If I would have known you better, if I had gone to high school with you, maybe we would be doing business right now." Petitioner Ivey stated that the "words" the agents used were wrong and that if they used the right "words" they could do business in the future. Pet. App. 4a.

Thereafter, on February 4, 1987, petitioners returned to the Fur House to purchase bobcat hides. Petitioners asked the agents to sign a waiver certifying that the bobcats were legally taken. One of the agents signed the waiver, commenting, "You all were good teachers the last time, we are good learners. If that is what it takes, I will sign it." Pet. App. 4a.

3. On June 28, 1990, petitioners were charged in a seven-count superseding indictment with conspiracy to receive and receipt of bobcat hides imported illegally into the United States. Petitioners moved to dismiss the indictment, but the district court denied the motion.

At trial, the district court instructed the jury that "importation of bobcat hides into the United States from the Republic of Mexico without proper permits is contrary to law." 5 Tr. 223; see Pet. App. 11a. In addition, the jury was instructed not to convict petitioners unless it found, *inter alia*, that petitioners knew that the bobcat hides had been imported illegally into the United States. 5 Tr. 220, 222-223.

4. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-21a. The court held that the ESA's incorporation of the Convention was meant to encompass subsequent amendments to the Convention, reasoning that the contrary interpretation would undermine the purposes of the ESA and that the Convention as originally adopted provided for amendments to the appendices. Pet. App. 6a-8a. The court also held that the Convention was applicable to this case even though Mexico, the country of origin of the bobcat hides, is not a party to the Convention. *Id.* at 8a-9a. The court explained that "[r]egardless of whether the Convention encompasses non-signatories, the Convention applies to trade within a signatory's jurisdiction," and that "United States law requires persons subject to its jurisdiction to obtain proper export permits from the country of origin establishing that the species was lawfully taken." *Id.* at 8a-9a.

The court also rejected petitioners' claim that 16 U.S.C. 1538(c) is violated only where defendants act with specific intent to violate known legal duties. Relying on the legislative history and general regulatory purpose of the ESA, the court concluded that the statute requires only general criminal intent. Pet. App. 11a-13a.

ARGUMENT

1. Petitioners contend (Pet. 4-6) that the district court erred in depriving the jury of the opportunity to decide whether bobcats are listed in Appendix II of the Convention and, if so, whether the animals involved in this case were bobcats within the meaning of the Appendix II listing. That contention lacks merit.

The district court correctly ruled as a matter of law that bobcats are listed in Appendix II of the Convention. Since 1977, Appendix II and the federal regulations implementing the Convention have listed all species of cat

other than the common house cat. 42 Fed. Reg. 10,469 (1977); 50 C.F.R. 23.23. The determination of the scope and coverage of federal law is, of course, quintessentially a question of law to be decided by the court.

United States v. *Doyle*, 786 F.2d 1440 (9th Cir.), cert. denied, 479 U.S. 984 (1986), on which petitioners rely (Pet. 5-6), is not to the contrary. In *Doyle*, the defendant was charged with illegally trading in falcons, in violation of the ESA. The court began its analysis by noting that "[i]t is undisputed that an anatum peregrine falcon is * * * an endangered species" within the meaning of the ESA, citing the applicable regulations. 786 F.2d at 1444. The court went on to find, however, that the government had failed to meet its burden of proving "beyond a reasonable doubt that the falcons which Doyle transported were anatum peregrine falcons." *Ibid.* Thus, *Doyle* stands only for the proposition that the government must prove that the particular animals received or transported by the defendants were in fact specimens of a species subject to the protections of the ESA; *Doyle* provides no support for the contention that the jury must be permitted to determine whether a particular species as a whole is protected by the ESA.

The decision below is entirely consistent with *Doyle*. Contrary to petitioners' contention, the district court did not take from the jury the question whether the hides received by petitioners were in fact specimens of a species—the common bobcat—that is listed in Appendix II of the Convention. Instead, the district court clearly instructed the jury that it could not convict petitioners unless it first found that they "knowingly received and concealed bobcat hides." 5 Tr. 222, 223.[1] Thus, the

[1] Moreover, the court of appeals concluded that there was sufficient evidence at trial to support the jury's finding that the particular hides in question were bobcat hides. Pet. App. 15a-16a.

district court properly left to the jury the factual question whether petitioners received bobcat hides, while reserving to itself the legal question of the precise meaning and scope of the Convention and the ESA. Petitioners' claim does not warrant further review.

2. Petitioners also argue (Pet. 9-10) that specific intent is required for a criminal conviction under 16 U.S.C. 1538(c), the provision of the ESA that makes it unlawful to engage in trade in violation of the Convention. But petitioners were not charged with or convicted of violating 16 U.S.C. 1538(c).[2] Instead, they were convicted of conspiring to violate 18 U.S.C. 545 and of violating 18 U.S.C. 545 by knowingly receiving bobcat hides that had been illegally imported into the United States. Gov't C.A. Br. 2. Thus, petitioners' claim is beside the point. The proper question is the *mens rea* required for conviction under 18 U.S.C. 545, a question not presented in the petition.

In any event, petitioners' claim would lack merit even if it were properly presented. The district court instructed the jury not to convict unless petitioners *knew* that the bobcat pelts had been imported in violation of law. 5 Tr. 220, 222-223.[3] Thus, petitioners' concern

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[2] Strictly speaking, 16 U.S.C. 1538(c) does not establish a criminal offense at all. Section 1538(c) states merely that "[i]t is unlawful" to engage in trade contrary to the provisions of the Convention. Violation of Section 1538(c)(1) is made a criminal offense by virtue of 16 U.S.C. 1540(b)(1), but petitioners were not charged under that provision, which in any event creates a *general* intent crime. See *United States* v. *Nguyen*, 916 F.2d 1016, 1018-1019 (5th Cir. 1990); *United States* v. *St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *United States* v. *Billie*, 667 F. Supp. 1485, 1492-1493 (S.D. Fla. 1987).

[3] With respect to the conspiracy count, the district court instructed the jury that the government was required to prove that petitioners "knowingly receive[d] and conceal[ed] merchandise that was unlawfully imported into the United States *and which they*

(Pet. 10) that "[n]o useful end is served by prosecuting the 'violators' when they have no knowledge of the law's provision" is simply not implicated here, because the jury found beyond a reasonable doubt that petitioners did in fact know that the law had been violated.

3. Petitioners assert (Pet. 6-7) that the ESA's incorporation of the Convention in Section 1538(c)(1) is limited to the version of the Convention and its appendices that existed on March 3, 1973. Petitioners rely on the Act's definition of the term "Convention" as "the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto." 16 U.S.C. 1532(4).

Petitioners' argument is inconsistent with the plain language of the statute. By normal principles of grammar, the phrase "signed on March 3, 1973," modifies the phrase "Convention on International Trade in Endangered Species of Wild Fauna and Flora," and not the phrase "appendices thereto." Thus, nothing in the text of the ESA limits the incorporation of the appendices to the form in which they existed in 1973.

Moreover, the Convention expressly provides for regular amendments to the appendices to add or remove species as conditions change. Convention arts. XV-XVI, 27 U.S.T. 1110-1114; Pet. App. 50a-54a. Petitioners' interpretation would read those provisions out of the Convention, and would frustrate the goals of the

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knew to be unlawfully imported into the United States." 5 Tr. 220 (emphasis added). The court included a similar instruction for each of the substantive counts. 5 Tr. 222 (petitioner Wallace "knew that the merchandise imported or brought into the United States was brought in contrary to law"); *id.* at 223 (petitioners "knowingly received and concealed bobcat hides * * * knowing said merchandise to have been imported or brought into the United States contrary to law"); *ibid.* (incorporating elements of previous count by reference).

Convention and the ESA. Pet. App. 7a. Accordingly, the court of appeals correctly rejected petitioners' interpretation of the Act.[4] Further review is not warranted.

4. Petitioners clearly err in contending (Pet. 8-9) that the importation of restricted species from Mexico is not prohibited by the Convention because Mexico is not a party to the Convention. The Convention expressly provides that "[t]he import of any specimen of a species included in Appendix II shall require the prior presentation of either an export permit or a re-export certificate." Convention art. IV(4), 27 U.S.T. 1096; Pet. App. 34a; see also 50 C.F.R. 23.12(a)(2)(i). The Convention recognizes that non-signatory nations may not provide documentation in the form specified by the Convention, and accordingly states that "comparable documentation * * * which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party." Convention art. X, 27 U.S.T. 1104; Pet. App. 43a-44a; see also 50 C.F.R. 23.14. Thus, regardless of a listed specimen's country of origin, the Convention forbids the importation of the specimen into the United States without appropriate documentation.

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[4] The decision below is also in accord with those decisions holding in similar contexts that the applicable law is the law which exists at the time of the offense, not the law which existed at some previous time. See, *e.g.*, *United States v. Francisco*, 536 F.2d 1293, 1295-1298 (9th Cir.), cert. denied, 429 U.S. 942 (1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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